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No. 08-94

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IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

RICKY MALLORY, BRAHEEM LEWIS and HAKIM LEWIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondents were convicted in the Court of Common Pleas of Philadelphia as per CP 97-09-1109 (Braheem Lewis), CP 98-07-0777 (Hakim Lewis) and CP 98-02-0065 (Ricky Mallory) following a non-jury trial before the Honorable Rayford Means. On October 5, 1998, Judge Means sentenced each of these Respondents to a term of not less than 35 nor more than 70 years imprisonment. Direct review was provided but relief was denied by the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania denied Allowance of Appeal on September 5, 2000.

On November 27, 2001, the present PCRA Petition was filed raising several claims of ineffective assistance of prior counsel, among which was the claim that the Petitioner's federal and state constitutional right to a trial by jury had been abridged because their proffered waiver of jury trial was not voluntary. In that regard, the Lewis Respondents alleged that this issue was ineffectively omitted in their direct appeal to the Superior Court.

The Honorable D. Webster Keogh of the Court of Common Pleas conducted evidentiary hearings in these matters in 2004 and granted a new trial by Order dated March 2, 2004. The prosecution filed an

appeal and the Superior Court of Pennsylvania reversed on November 12, 2005. *Commonwealth v. Mallory, et al*, 888 A. 2d 854 (Pa. Super. 2005). Respondents filed a Petition for Reargument En Banc but the same was denied by Order dated January 12, 2006.

The Supreme Court of Pennsylvania granted the Respondents' Petition for Allowance of Appeal on June 6, 2006. The case was argued before the Supreme Court of Pennsylvania and the matter was held under advisement until February 19, 2008, when, in an Opinion by Chief Justice Ronald Castille, the Supreme Court reversed the Order of the Superior Court and remanded the matter to the PCRA court for further proceedings. 941 A. 2d 686 (Pa. 2008).

STATEMENT OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI FILED BY THE COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania has filed a Petition for a Writ of Certiorari with this Court, raising the question as to whether a criminal defendant can establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to ensure a valid jury trial waiver, without a requirement that the ineffective assistance had any effect on the verdict. The Respondents respectfully submit that this matter is not presently worthy of review before this Court since the ruling of the Supreme Court of Pennsylvania has resolved nothing about this case but has merely remanded the matter to the Post Conviction Relief Act Court for further evidentiary hearings, and has done so with state rules and procedures in mind. In addition, the Respondents note that the Supreme Court of Pennsylvania has decided this case entirely consistent with controlling United States Supreme Court precedent, including *Strickland v. Washington, supra.*

THE DECISION OF THE PENNSYLVANIA SUPREME COURT WAS NOT INCONSISTENT WITH THIS COURT'S PREVIOUS RULINGS

The Supreme Court of Pennsylvania held that when a defendant seeks to collaterally attack his waiver of a jury trial on the ground that it was caused by ineffective assistance of counsel, with respect to the issue of prejudice under *Strickland*, supra, what the defendant must demonstrate is that there exists a reasonable probability that "the outcome of the waiver proceeding would have been different" (App.42). The Pennsylvania Supreme Court therefore remanded this matter for further proceedings, based upon that holding.

The Respondents' respectfully submit that this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985) was fairly and properly interpreted by the Supreme Court of Pennsylvania in this case. In *Hill*, this Court focused not on whether the result of a trial would have been different had the Petitioner not pleaded guilty, but rather what was the result of the guilty plea process itself. See also *Lockhart v. Fretwell*, 506 U.S. 364 (1993), where this Court stated that the prejudice component of the *Strickland* test focuses not merely on outcome determination but on whether the result of the proceeding in question was unfair, unreliable or defective. Subsequent to the decision in *Hill v. Lockhart*, supra, this Court decided *Roe v Flores-Ortega*, 528 U.S. 470 (2000) and *Florida v. Nixon*, 543 U.S. 175 (2004). In *Roe*, this Court affirmed the principle that the ineffective assistance of counsel in failing to file a requested appeal entitled a defendant

to a new appeal "without showing that his appeal would likely have had merit". Id. at 470. The Court stated that no specific showing of prejudice is required where counsel's ineffectiveness lead not to a judicial proceeding of disputed reliability but rather to the forfeiture of the proceeding itself. Id. at 483. In the context of an appeal, which the accused wanted to have and to which he had a right to have, the loss of the constitutional right itself was the prejudice to the defendant. Accordingly, under *Roe,* all that the defendant has to show is that he would have appealed but for counsel's deficient performance, not that the appeal would have had a successful result. In reaching that conclusion, the court specifically relied upon *Hill v. Lockhart,* supra, as well as *Rodriquez v. United States,* 395 U.S. 327 (1969). Id at 485. Importantly, the Court compared the decision whether to appeal to the decision whether to plead guilty, and noted that both involve a decision personal to the defendant. The same is true with respect to the decision whether or not to waive the right to jury trial. *Duncan v. Louisiana,* 39 U.S. 145 (1968) (defendant has federal constitutional right to a jury trial through the 14th Amendment). If in the context of a guilty plea ("waiver of trial") or a waiver of an appeal, where there is a claim of ineffective assistance of counsel, the defendant only has to show that there is a reasonable probability that otherwise the defendant would have exercised the constitutional right in

question (i.e., to plead not guilty or to take an appeal), the same analysis should apply with respect to the decision to proceed with or to waive a jury trial. Thus the prejudice analysis in such cases would be limited to determining whether or not at the stage of the proceedings involved (here, the jury waiver decision), there would have been a different outcome but for the ineffective assistance of counsel.

In *Roe*, the Court concluded that it would impose too heavy a burden on a defendant to have to prove that he would have had a successful appeal in order to recover that lost right; rather, the Court only requires that the defendant demonstrate that, but for counsel's deficient conduct, he would have pursued that right.

In *Florida v. Nixon*, supra, the Court was faced with a situation where defense counsel had failed to obtain the defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital trial. The Court concluded that this failure did not automatically render counsel's performance constitutionally inadequate. The Court cited its earlier decision in *Jones v. Barnes*, 463 U.S. 745 (1983) for the proposition that only a defendant can determine whether to plead guilty, waive a trial by jury, testify in his own behalf or take an appeal. The Court observed that as to these decisions, the law is not focusing on a tactic or a strategic choice; rather, these are matters of the highest stakes for an accused requiring "the utmost solicitude". Id. at 187.

An attorney's tactical concession of his client's guilt represents a strategic trial decision subject to a normal prejudice requirement as set forth in *Strickland*, supra, that is, that the outcome of the trial itself would have been different had the attorney acted differently.

Accordingly, the Respondents respectfully submit that the instant situation does not present a claim of "trial error", or an error which occurred during the presentation of a case to the jury and which therefore could be quantitatively assessed in the context of other evidence presented in order to determine whether or not the outcome of the trial would have been different. *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). This case presents a situation where, like the right to plead not guilty and the right to pursue a direct appeal, the Respondents were, as a result of ineffective assistance of counsel, deprived of a federal and state constitutional right. In such a situation, as this Court has already made clear, the Respondents cannot be asked to prove that the outcome of a jury trial would have been different than the outcome of the non-jury trial that they actually had. Rather, what the Respondents can be requested to prove, and hope to do so upon remand, is that had counsel provided effective assistance, they would most assuredly had requested a jury trial. *Duncan v. Lousiana*, supra at 156 ("If the defendant preferred the common sense judgment of a jury to the more

tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

In this case, the Respondents ending up forfeiting an entire judicial proceeding, to wit, their federal and state constitutional right to a trial by jury. To establish prejudice under *Strickland*, a Respondent need only demonstrate that the outcome of that jury waiver proceeding would have been different, not that he would have been found not guilty had there been a trial by jury. No petitioner can meet that standard because any argument to that effect would be based completely upon speculation. Although the Respondents have contended throughout this litigation that the absence of a jury trial should be viewed as a "structural error" for which prejudice should be presumed, the decision of the Supreme Court of Pennsylvania refused to accept the Respondents' argument that like reasoning in *McGurk v. Stemberg*, 163 F. 3d 470 (8th Cir. 1998) should be adopted in this case.[1] In rejecting *McGurk*, the

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[1] See also *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial falls in the category of constitutional errors which are not subject to harmless error); *McCaskle v. Wiggins*, 465 U.S. 168 (1994) (same as to the right to self-representation at trial); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (same as to right to counsel of choice); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (same as to denial of the right to a jury verdict of guilty beyond a reasonable doubt) and *Deck v. Missouri*, 544 U.S. 622 (2005) (same as to shackling of

Opinion of Chief Justice Castille specifically states that "actual prejudice must be shown" where a criminal defendant claims that, as a result of ineffective assistance, he has lost his right to trial by jury. The Supreme Court of Pennsylvania went on to determine that the "actual prejudice" must be related to "the proceeding" in dispute, to wit, the jury waiver proceedings, and not the ultimate trial (App.38).

The lower court's conclusion that a criminal defendant does not have to demonstrate that the outcome of the jury trial would have been more favorable than the bench trial that he had is appropriate based upon this Court's precedents discussed above. As in *Hill v. Lockhart*, supra, the focus must be on the outcome of the proceeding at hand, not that the trial result would have been different.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT DOES NOT REPRESENT A FINAL RULING ON AN ISSUE OF FEDERAL CONSTITUTIONAL LAW.

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defendant at a jury trial). Each of these constitutional deprivations is a structural defect affecting the framework in which the trial proceeds, rather than simply an error in the trial process itself. The same should be true as to the right to a trial by jury.

The mandate of the Supreme Court of Pennsylvania was simply to allow the PCRA court to focus on the totality of the circumstances that impacted upon the jury trial waiver. A remand was deemed necessary because the PCRA court had relied on the absence of an oral waiver colloquy with the trial court for too great of an extent (App.43). Thus this was clearly a matter of interpretation of Pennsylvania procedural rules, as was discussed in the Supreme Court of Pennsylvania's Opinion (see App.21-25).

This Court has repeatedly stated that where the judgment of a state court rests upon two grounds, one of which is federal and the other non federal in character, the Court has no jurisdiction to review the judgment if the non- federal ground is independent of the federal ground and adequate to support the judgment. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

Therefore, this Court should refuse to review this case in light of the standards set forth in Rule 10(b) of the rules of this Court. Under 28 U.S. Code §1257(a), this Court possesses jurisdiction to review state court determinations only to the extent that they rest upon federal law. *Oregon v. Guzek*, 546 U.S. 517, 521 (2006).Accordingly, this Court should allow this case to proceed with that remand order so that, as a matter of state law and procedure, the PCRA court can determine whether or not the waiver of jury trial that was offered in this case

should be set aside as a result of ineffective assistance of counsel. There is no need for the lower court to also decide whether or not the outcome of a jury trial, had one occurred, would have been different than the outcome of the non-jury trial that actually took place. That would be guesswork, not legal analysis. [2]

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[2] It would also mean that no defendant could ever prevail in a claim of ineffective assistance related to the jury waiver proceedings, as the defendant's burden of proof would be "insurmountable". See Justice Saylor's dissenting Opinion in *Commonwealth v. Lassiter*, 722 A. 2d 657, 664 (Pa. 1998), *United States v. Owens*, 483 F. 3d 48 (1st Cir. 2007) (prejudice presumed from ineffectiveness in failing to preserve a claim that defendant denied right to a public trial because that error would almost always be held to be harmless, and thus "its denial would be without consequence") and *United States v. Gonzales Lopez*, supra at 2565 (Court will not require defendant "to speculate upon what matters the rejected counsel would have handled differently").

CONCLUSION

The Respondents respectfully submit that in this case, the Supreme Court of Pennsylvania followed this court's jurisprudence in *Strickland* and other cases by ruling that "actual prejudice" must be shown but that under Pennsylvania rules and laws, the analysis provided so far by the PCRA court was not adequate. The ruling of the Supreme Court of Pennsylvania did not hold that there should be a presumption of prejudice on the structural error theory advanced by counsel for the Respondents; rather, the Supreme Court of Pennsylvania has merely ruled that the defendant must show "actual prejudice" with regard to the jury waiver proceeding and not the trial. Since that conclusion is consistent with *Hill v. Lockhart*, supra, *Roe v. Flores-Ortega*, supra and *Strickland*, supra, there is no justification for further delay in this case by review being granted in this Court. Therefore, the Commonwealth's Petition should be denied.

Respectfully submitted,

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